United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

DOCKET NO
75-7659

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-7659

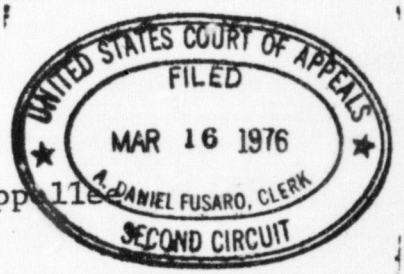
Vicente Lugo,

Plaintiff-Appellant

against

Isthmian Lines, Inc.,

Defenant-Appellee



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STATEMENT OF ISSUES PRESENTED

The following issues are presented by this Appeal:

1. Did the court below err in refusing to charge the jury, as requested by the plaintiff, on negligence that if it should find the defendant's negligence, played any part, even the slightest, in producing the accident and resulting injuries to plaintiff, then it must render a verdict in favor of the plaintiff?

2. Did the court err in giving the traditional proximate cause charge, in a Jones Act case, without any explanation as to degree of negligence required to establish proximate cause, and without so stating in the special verdict to the jury?

3. Was the verdict against the weight of evidence and against the law?

4. Did the court err in submitting the special verdict to the jury concerning proximate cause in the form as drawn?

5. Did the court err in refusing to permit plaintiff to present a hypothetical question to his medical witness establishing relationship between the accident and improper and inadequate ventilation and conditions existing in the hatch?

PRELIMINARY STATEMENT

This is an appeal from the final judgment against the plaintiff and verdict and order upon which it is based, dismissing the complaint on the basis that the jury, although finding negligence and/or unseaworthiness, failed to find that said negligence or unseaworthiness was a proximate cause of the accident and plaintiff's resulting injuries.

STATEMENT OF RELEVANT FACTS

Plaintiff, Vicente Lugo, brought an action for personal injuries, pursuant to the Jones Act (46 USCA §688) and the General Maritime Law, based on negligence and unseaworthiness.

Plaintiff sustained severe injuries on or about June 1, 1972, in the course of his employment aboard the S.S. Steel Maker, while working in the number two hatch, as an ordinary seaman, when he was caused to fall into the port aft deep tank. The negligence and/or unseaworthiness was based on improper and inadequate ventilation and lighting in the said hatch.

The jury trial in this action commenced on June 24, 1975, and on July 1, 1975, in response to special verdict questions or interrogatories submitted by the court, the jury rendered a special verdict in favor of the defendant, finding that the vessel was unseaworthy or that defendant was negligent, but finding that such unseaworthiness or negligence, was not a proximate cause of the accident and the resulting injuries to the plaintiff. (see Court Exhibit No. 6).

Thereafter, plaintiff made a motion to set aside that portion of the verdict stating that the unseaworthiness of the vessel or negligence of the defendant, was not a proximate cause of the accident and resulting injuries to plaintiff. This motion was denied by the court below and final judgment in favor of the defendant, dismissing the complaint, was issued on October 30, 1975.

Thereafter, a notice of appeal was filed by the plaintiff on November 24, 1975.

The evidence is that plaintiff, Vicente Lugo, sustained injuries as a result of the negligence of the defendant and the unseaworthiness of the vessel, and this was the proximate cause of his accident and resulting injuries.

Mr. Lugo's uncontradicted testimony was that the air in the number two hatch, was hot, stale, stuffy and humid at the time of the accident. (Tr p. 50, 54, 70, 72, 73, 349)*. These conditions made him feel faint and dizzy and caused him to have trouble breathing. (Tr p. 76, 77, 88, 89), and as a result he lost consciousness and toppled

*The references hereafter are to the pages of the official transcript of the record of the trial below.

or fell into the port aft deep tank. He further testified that at the time he started to lose consciousness and faint (Tr p. 86, 88, 89, 171, 172), even if his state of consciousness would have permitted him to control or position his fall (Tr p. 171), he was unable to do so because he had trouble seeing, due to the improper and inadequate lighted area where he had been working.

There was expert testimony that the lights had been improperly and inadequately placed and were inadequate and insufficient, and the jury so found.

The bosun, Jose Gomez, confirmed these conditions in the hold (Tr p. 329).

Furthermore, Mr. Lugo testified that because of the improper ventilation, hot, stale and bad air in the said hatch, he sweated profusely and was required to change his shirt and take salt tablets during coffee break, because of this. (Tr p. 64, 164 and 165).

The hatch had been closed from approximately 1:30 P.M., May 31, 1972, to 10:30 A.M., June 1, 1972, the

time of the accident, which was approximately twenty-one hours prior to the accident. (Tr p. 76, 77, 519, 567, and Plaintiff's Exhibit 26). There was expert testimony that the customary and proper procedure, under the conditions existing just prior to the accident, would have been to break open the hatch before the work was performed. Since the ventilation system had not been turned on, the air was uncirculated and stale (Tr p. 50, 72, 334, 335). The temperature inside the hatch was estimated to be 100° (Tr p. 54, 70, 73, 338). Even if the hatch was not broken open, or if conditions of the sea would not have permitted it, which was not the case, the testimony was that the usual and customary practice would have been to turn the ventilation system on which was in the hatch, so as to ventilate the hatch prior to sending men in and during the time the men were working in the hatch. The testimony clearly showed there was nothing which would have prevented defendant from doing this.

The testimony and medical records demonstrate conclusively, that Mr. Lugo was in good health, and that he had no problems or conditions which would have caused him to faint or lose consciousness. (Tr p. 42, 111, 112 and Defendant's Exhibit A).

In addition to this, the company conducted a pre-sign-on physical examination of Mr. Lugo and he was found to be fit for duty and in good general health (Tr p. 42). The defendant in attempting to cause a smoke screen or camouflage, tried to show that the accident was caused by plaintiff's poor health, and in support of this, introduced medical records from the Seafarers Welfare Plan (Devendant's Exhibit A), that plaintiff was prescribed glasses and was not wearing glasses at the time. The truth of the matter is that the exhibit belies this defense, in that on June 3, 1971, the last examination prior to the accident, the record clearly showed that plaintiff was only required to wear reading glasses not glasses for work.

Furthermore, the defendant tried to show that plaintiff was prone to difficulty in breathing, but the record on which it relied, a medical record from the S.S. Longview Victory, clearly showed that plaintiff had a cold, and specifically, had no problems or difficulties breathing.

Furthermore, even if plaintiff was required to wear glasses, this would have no bearing on the accident, since he was not moving at the time of the accident, but merely standing still on a narrow ledge. The plaintiff so testified (Tr p.33, 280, 282) and the defendant so conceded in its summation (Tr p. 781,782). Therefore, the wearing of glasses even if required to do so, would have had no bearing on or cause the accident.

In one of the points herein, the facts are set forth in more detail and the court is respectfully referred to those facts in support of the contentions stated.

No evidence was presented at the trial from which it could have been reasonably inferred that the accident could have resulted from any cause other than improper and inadequate ventilation and lighting in the number two hatch.

POINT I

THE COURT ERRED IN REFUSING TO CHARGE THE JURY, AS REQUESTED BY THE PLAINTIFF, THAT IF IT SHOULD FIND THAT THE DEFENDANT'S NEGLIGENCE PLAYED ANY PART, EVEN THE SLIGHTEST, IN PRODUCING THE ACCIDENT AND RESULTING INJURIES TO THE PLAINTIFF, THEN IT MUST RENDER A VERDICT IN FAVOR OF THE PLAINTIFF, AND SUCH ERROR CAUSED THE JURY TO RENDER A VERDICT THAT IS INCONSISTENT AND CONTRARY TO THE WEIGHT OF THE EVIDENCE AND THE LAW.

The plaintiff requested the Court to charge the jury that if it should find that the defendant's negligence played any part, even the slightest, in producing the accident and resulting injuries to the plaintiff, then it must render a verdict in favor of plaintiff. The Court refused this request and the only comment made as to the degree of negligence required, was as follows:

> "The question is whether any unseaworthy condition of the vessel or any negligence on the part of the shipowner played any role in producing the accident which Lugo suffered and the injury which resulted from the accident" (Tr p. 846)

In addition to this, the Court gave the traditional common law charge on proximate cause, not the Jones Act type of charge. The charge on proximate cause, was as follows:

> "What do I mean by proximate cause? Proximate cause means, in effect, a producing cause of the accident which resulted in the injury. It must be an unbroken chain of events or circumstances flowing from the unseaworthiness or the negligence, if you find there was such, and leading to the accident. There must be a direct causal connection between unseaworthiness or negligence if you find any and the accident which caused the injuries" (Tr p. 845).

It is respectfully submitted that in so doing, the Court failed to charge in accordance with the established law governing causation in Jones Act cases, and as a result, the verdict must be set aside. Furthermore, as a result of the Court's failure to give the proper charge, the jury was caused to render a verdict which was inconsistent and contrary to the weight of the evidence and the law. Had this been explained to the jury so that it understood that the plaintiff would be entitled to recover if it were to find that defendant's negligence played any part, even the slightest, in causing the accident, it could not reasonably have failed to find causation under the facts present. Instead, the charge of the Court without the required explanation or clarification led the jury to misapply the law to the facts it found.

It is well-established that the test for causation in Jones Act and Federal Employers Liability Act (FELA) cases differs markedly from the traditional test of proximate cause in ordinary negligence actions. Thest test for causation in FELA cases was articulated by the United States Supreme Court in Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957), as follows:

> "[The test is] simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence." 352 U.S. at 506 (citations omitted).

In Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 (1957), a companion case brought under the Jones Act, the Court quoted the above language from Rogers, and made it clear that the same causation test is applicable in Jones Act cases. 352 U.S. at 523.

Thus, the Supreme Court has made it clear that in Jones Act cases, the plaintiff must only prove that employer negligence played any part, even the slightest, in producing the plaintiff's injury. By way of contrast, in an ordinary negligence action, it is proper for the Court to charge the jury that the negligent act or omission must have played a "substantial part in bringing about or actually causing the injury or damage . . . " Devitt and Blackmar, Federal Jury Practice and Instructions § 73.18. It is clear, however, that it would be improper for the Court to so charge the jury in a Jones Act case, and unless the Court, at the very least, were to give further clarifying instructions which

comply with the Rogers opinion, it would be reversible error. Farnarjian v. American Export Isbrandtsen Lines, Inc., 474 F. 2d 361 (2d Cir. 1973).

In order for the jury in a Jones Act case to have a clear understanding of the Rogers causation test, the Court must give a causation charge which clearly conveys the concept of that test. The traditional "proximate cause" test is clarly contrary to the Rogers test, and it is just not applicable in Jones Act cases. In fact, some courts have suggested that the term "proximate cause" should not even be mentioned to the jury. Tyree v. New York Central R.Co., 382 F. 2d 524, 529 (6th Cir. 1967) cert denied, 389 U.S. 1014 (1967); Page v. St. Louis Southwestern Ry. Co., 312 F. 2d 84, 87 (5th Cir. 1963). In Tyree the Court stated as follows:

> [I]t would be better ... if no mention of proximate cause whatever was made to the jury and, following the views of the Supreme Court as expressed in Rogers v. Missouri Pacific R. Co., supra, that the jury be instructed on the subject of causation to the effect that if employer negligence played any part, even the slightest, in producing the injury, the employer is liable in damages ..." 382 F.2d at 529.

The Court in Tyree further suggested that if a court does decide to use the term "proximate cause", it should be done in the context of what has become known as the Mathes and Devitt Instruction. The Court quoted this charge as follows:

> "An injury or damage is proximately caused by an act, or failure to act, whenever it appears, from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find, from the evidence in the case, that any negligence of the defendant contributed, in any way or manner, towards any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission." 382 F.2d at 526 (quoting from Morrison v. New York Central R.R. Co., 361 F. 2d 319, 320, (6th Cir. 1966), and citing Mathes and Devitt, Federal Jury Practice and Instructions §84.12 (1965)

In the case at bar, the Court refused the plaintiff's request for a causation charge in the language of the Supreme Court's Rogers opinion, and instead gave a traditional common law proximate cause charge.

In Delima v. Trinidad Corp., 302 F.2d, 585 (2nd Cir. 1962), the court held it was error for the trial court to have rejected the plaintiff's request for a similar Rogers causation charge, and to have given a traditional proximate cause charge instead. The plaintiff, an injured seaman, who was

asserting claims for negligence under the Jones Act, and for unseaworthiness, had requested the Court to charge the jury that if the employer's negligence, "played any part, even the slightest, in producing an injury to plaintiff, the plaintiff may recover" 302 F.2d at 587. Instead of so charging the jury, the court gave a traditional common law instruction that "proximate cause is that cause which is the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of, and without which it would not have occurred" 302 U.S. at 588. The Second Circuit, in holding it to be reversible error to refuse the causation charge requested by the plaintiff, reasoned as follows:

> "Since the language of the requested charge was taken directly from Rogers v. Missouri Pac. R.Co., 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957), a decision which reflects the Supreme Court's view that the Federal Employers' Liability Act., 45 U.S.C.A. §51 et seq. and the Jones Act are departures from common law principles, we believe the requested charge should have been given." 302 F.2d at 588 (footnote omitted).

The language of plaintiff's requested charge was also taken directly from Rogers. Plaintiff requested the Court to charge as follows with respect to negligence:

"6- If the shipowner's negligence played any part, even the slightest, in producing the injuries, a seaman can recover, citing DeLima v. Trinidad Corp. 302 F. 2d, 588 (2 Cir. 1962), which in essence quoted the Rogers case, supra. (Court's Exhibit 1)

The Court refused to charge, as requested. The proximate cause charge given in Delima, which the Court held to be in error, is very similar to the one given in the within case. Thus, the Delima case clearly governs the within case, and requires the verdict to be set aside.

In Page v. St. Louis Southwestern Railway Co., 312, F.2d, 84 (5th Cir. 1963), the Fifth Circuit similarly held that the trial court had failed to properly charge the jury in accordance with the Rogers standards on the issue of causation. In this FELA case, the trial court had given the following proximate cause charge, which the Fifth Circuit held to be reversible error:

"The term 'proximate cause' as used in this charge had a definite legal meaning which may differ from your understanding of the meaning of that term as used in ordinary parlance.

"As used in this charge the term 'proximate cause' means that cause which in a natural and continuous sequence produced the event or happening in question and without which such event or happening would not have occurred; and the act or omission in question

> only becomes a proximate cause of an event or happening when such event or happening is the natural and probable (sic) consequence of such act or omission and is such a consequence as ought to have been foreseen by a person in the exercise of ordinary care in the light of attending circumstances. It need not be the sole cause, but it must be a concurring cause which contributed to the production of the result in question and but for which such result or accident would not have occurred." 312 F. 2d at 87.

The charge by the Court below, was even less specific and more general than this one, and without any clarification. Although the Court cautions that the case "does not call for any wholesale condemnation of the use of the language of proximate causation in cases under this act", the Court's holding and reasoning does in effect condemn the use of such language. Id. at 92. The Court goes on to analyze the language of the entire charge and states that its requirements "are foreign to the simple test prescribed in Rogers." Id. Thus, the Court leaves little doubt that it is reversible error in a Jones Act or FELA case, to fail to charge the jury in accordance with Rogers, and to give a traditional proximate cause charge instead. This is precisely what the court has done in the case at bar, and as a result, the verdict must be set aside.

The conclusion is inescapable that the erroneous proximate cause charge caused the jury to render a verdict that is inconsistent and contrary to the weight of the evidence and law. However, the mere fact that the jury rendered such a defective verdict requires it to be set aside, regardless of how it arose.

POINT II

THE COURT ERRED IN GIVING A TRADITIONAL PROXIMATE CAUSE CHARGE WITHOUT STATING IN THAT CHARGE AND IN THE SPECIAL VERDICT QUESTION THAT THE PLAINTIFF IS ENTITLED TO A VERDICT IF THE DEFENDANT'S NEGLIGENCE OR THE VESSEL'S UNSEAWORTHINESS CAUSED, IN WHOLE OR IN PART, THE PLAINTIFF'S ACCIDENT AND RESULTING INJURIES, RESULTING IN A VERDICT THAT IS INCONSISTENT AND CONTRARY TO THE WEIGHT OF THE EVIDENCE AND LAW.

As demonstrated in Point I above, the Second Circuit in Delima, supra, and other courts as well, have held it to be reversible error to refuse plaintiff's request for a Rogers charge, and to give a traditional proximate cause charge instead. In the case at bar, however, the court further compounded that error by failing to state in the proximate cause charge and in the special verdict question #2, referring to proximate cause, that the plaintiff need only prove that defendant's negligence or the unseaworthiness of

the vessel caused "in whole or in part", his accident and resulting injuries.

Instead the Court with respect to special verdict #2, concerning proximate cause, submitted the following to the jury:

> "2. If your answer to question #1, is yes, was such unseaworthiness or negligence a proximate cause of the accident and the resulting injuries to plaintiff Lugo?"
>
> Yes _____ No _____

Plaintiff's attorney objected to the form in which unseaworthiness or negligence and proximate cause were presented to the jury, maintaining that Question #1, which was as follows:

> "1. Was the S/S STEEL MAKER unseaworthy or was Isthmian Lines, Inc., negligent?"
>
> Yes _____ No _____

should be combined with Question #2, as one question and should read as follows:

"1. WaS the S/S STEEL MAKER unseaworthy or was Isthmian Lines, Inc., negligent, and if so, was it the proximate cause of the accident and resulting injuries to plaintiff, Lugo?"

The Court, in separating the question of proximate cause from the questions of negligence and unseaworthiness, as in special verdict question number two, put excessive emphasis on the issue of proximate cause, at the expense of other issues. This led the jury to believe that in order for the plaintiff to establish proximate cause, it was necessary to prove that improper ventilation and improper lighting, caused the accident, rather than that any slight degree of either improper ventilation or lighting caused the accident. This request was denied by the Court. (Tr p. 755 & 760-761).

Furthermore, under the decisions of this Court, as set forth herein concerning proximate cause, in Jones Act cases, even if proximate cause was set forth as a separate special verdict, it should have read as follows:

"If your answer to question #1 is 'yes' was such unseaworthiness or negligence in whole or in part a proximate cause of the accident and resulting injuries to plaintiff, Lugo"

At least this would have conveyed to the jury the degree of negligence required under the cases to establish proximate cause, was in whole or part, the cause.

Instead, the Court refused to do this and by the emphasis placed, conveyed to the jury, contrary to the requirements of the cases cited herein, that defendant's negligence or unseaworthiness, had to be the sole cause.

To compound this, the charge of the court to the jury is replete with the traditional proximate cause charge with no explanation as to degree of negligence required to establish proximate cause. Examples of these are as follows:

> "and secondly, that the Isthmian Lines was negligent and this negligence was a proximate cause of the injuries." (Tr p. 828 - lines 18-20)
>
> "Thus, the plaintiff has the burden of proving each of the elements of his case by a fair preponderance of the credible evidence." (Tr p. 830, lines 10-11)
>
> "--one of the principal questions before you will be what caused the accident to happen. The question of causation is a major concern here" (Tr p. 836, lines 2-5)
>
> "-- and whether if there was unseaworthiness or negligence, either of those factors was a proximate cause of the accident to Lugo and the resulting injuries." (Tr p. 839, line 25, Tr p. 840 Lines 2-4)

"The question here, this second question, important as it is, is: 'Whether even if there was unseaworthiness or negligence, this was a proximate cause of the accident to the plaintiff and the resulting injuries." (Tr p. 846 lines 16-20)

"I may say to you that the question of causal relationship between the conditions which were found in the hold, whatever you found them to be, and the accident suffered by plaintiff Lugo, is of particular importance in this action and should be considered by you carefully." (Tr p. 846, lines 21-25)

The Court in its charge on numerous occasions explained to the jury that there must be a proximate cause between the accident and the injuries, with no explanation whatsoever, as to the degree of proximate cause required under the existing law. There was no explanation as to the slight degree of negligence required to establish proximate cause. Furthermore, the Court in its charge to the jury compounded this error, by stating that the causal relationship is of particular importance in this action, and should be considered carefully by the Jury. (Tr p. 846 Lines 11-25), and that the question of proximate cause is most important (Tr p. 846, lines 16-20), and again stated that the question of causation is a major concern and one of the principal questions before the jury (Tr p. 836 lines 2-5), with no explanation as to the degree of proximate cause.

What the Court was doing in essence, in its charge, was stating to the jury that proximate cause was a major concern, emphasizing the importance of this but giving no guidelines as to the degree of proximate cause required to establish causal relationship, which lead the jury to obviously believe it had to be the sole cause.

The Court continued to compound this error in its charge, by stating to the jury in its charge at various times, in describing the negligence and unseaworthiness that the plaintiff must establish in a conjunctive manner as opposed to in the alternative.

The Court in its charge, in essence, conveyed to the jury that proximate cause must be negligence and unseaworthiness, as opposed to that it could be either and that any particular act of negligence or unseaworthiness as claimed by the plaintiff, was sufficient, if proven.

Plaintiff claimed the accident was caused by either improper or inadequate ventilation or lighting, not that the accident had to be caused by both improper and inadequate ventilation and lighting.

The Court in its charge conveyed this latter point to the jury, and the following are examples of this:

> "Lugo contends that he did not, himself, do anything to cause the accident to happen and that it was the failure of the defendant shipowner, acting through his officers and employees in supervisory positions aboard the STEELMAKER, to take precautions to provide proper light and proper ventilation, which brought about his fall." (Tr p. 836, line 25; Tr p. 837, lines 2 - 7)
>
> "Lugo's claim is that because of poor ventilation and poor lighting in the No. 2 hatch, the STEELMAKER was unseaworthy because the hatch where he was sent to work was unsafe and not reasonably fit for its intended use." (Tr p. 843, lines 3-6)
>
> "---The plaintiff must prove by a fair preponderance of the credible evidence, that a reasonably prudent shipowner or his reasonably prudent employees aboard ship in the exercise of reasonable care would not have permitted Lugo to work under the conditions of ventilation and light which you have heard described here" (Tr p. 844 lines 21-25; Tr p. 845 lines 2-3)
>
> "Of course, we are talking about negligence in connection with conditions to the hatch and unseaworthiness with respect to conditions in the hatch." (Tr p. 865 lines 19-21)

Thus, we have the situation where the Court in describing what plaintiff claims and has to prove, conveyed to the jury in its charge that plaintiff has to prove that improper and inadequate ventilation and lighting caused the

accident. At no time did the Court use the alternative, which was the case, namely, that the plaintiff only has to prove that either improper and inadequate ventilation or lighting caused the accident.

Yet, at the same time, the Court in charging the jury, as to what the defendant shipowner maintained, used the alternative rather than the conjunctive, conveying to the jury, that the shipowner did not have the same burden of proof with respect to proving itself free of negligence or unseaworthiness that the plaintiff had. The Court with respect to this, said as follows:

> "The defendant shipowner, on the other hand, strenuously denies that the accident was due to any failure or neglect on its part to provide necessary lighting or adequate ventilation for the performance of the job being done in the hold by LaFrance, Palmer and Lugo" (Tr p. 837, lines 8-12) (underlining supplied for emphasis)

Thus, not only did the Court in its charge refuse to explain the degree of negligence required to establish proximate cause, but, furthermore, conveyed to the jury in the charge that plaintiff had to prove both improper and inadequate ventilation and lighting was the proximate cause of plaintiff's accident and resulting injuries. All of this led to confusion on the part of the jury, without having proper instructions to follow and resulted in an improper

and inconsistent verdict.

As stated in Tyree and Farnarjian, supra, the courts have held that when a traditional proximate cause charge is used in cases such as the one at bar, without any explanation as to degree, to establish proximate cause, it leads to confusion by the jury. If the traditional proximate cause is not clarified to this extent, the courts have concluded that the jury would be confused and this would result in an inconsistent verdict. This is exactly what occurred in this case.

The jury could only conclude that the negligence and unseaworthiness had to be the sole cause.

In several recent cases, where the jury verdict in favor of the defendant has been upheld even though the trial court had charged the jury in the language of traditional common law proximate cause charge. Ely v. Reading Company, 424 F. 2d, 758 (3rd Cir. 1970) and Funseth v. Great Northern Railway Company, 399 F. 2d 918 (9th Cir. 1968). However, in these cases, there is a distinguishing

factor, in that the trial court had supplemented the traditional proximate cause charge, by stating to the jury that the defendant is liable for the injuries suffered by the plaintiff, resulting in whole or in part, from defendant's negligence. Furthermore, this was always repeated a number of times during the charge, so that the jury understood that the degree of negligence required to establish proximate cause was in whole or in part. This, the appellant court, concluded in the aforesaid cases, had overcome the prejudice to the plaintiff which inherently results when the court gives the traditional proximate cause charge instead of the Rogers charge. Such was not the case in the case at bar, since the court gave no elaboration or explanation to the jury of "in whole or in part".

Some courts have even held that even supplementing the traditional proximate cause charge with "in whole or in part" language, that such a charge is likely to result in confusing the jury. Farnarjain v. American Export Isbrandtsen Lines, Inc., 474 F. 2d, 361, 364 (2nd Cir. 1973); Tyree v. New York Central Railroad Company, 382 F. 2d 524, 529 (6th Cir. 1967) cert. denied 389 U.S. 1014 (1967); and Funseth v. Great Northern Railway Company 399 F. 2d 918 (9th Cir. 1968).

In the Funseth case supra, the Court commenting on using a proximate cause charge in the traditional form and supplementing it by using "in whole or in part" language, indicated its concern that the jury would be confused unless Rogers language is used, said as follows:

> "[T]he questioned instruction, if given alone ... might be misleading to the jury in that it might suggest that the negligence of the railroad would have to be the sole causative factor producing the injury". 399 F.2d at 922.

Devitt and Blackmar have suggested that "the word" 'proximate' (serves) no useful purpose in the instruction .... and that there might be confusion, especially if the same jury panel has ordinary negligence cases to try". Devitt and Blackmar, Federal Jury Practice and Instructions §89.12 (notes).

Thus, it may be persuasively argued that a traditional proximate cause charge constitutes reversible error, even if the court supplements it with "in whole or in part" language, because of the confusion that will result to the jury. But, in the case at bar, the court's traditional proximate cause charge is clearly reversible error, because it was not supplemented with such language in the charge, or in the special verdict question.

In Farnarjian v. American Export Isbrandtsen Lines, Inc., 474 F. 2d 361 (2nd Cir. 1973), A Jones Act case, the District Court had rejected plaintiff's request to charge the jury that plaintiff's burden was to prove that defendant's negligence played some part, however slight, in causing the occurrence in which plaintiff was injured." Instead, in charging the jury, the District Court had defined proximate cause as that cause which is a "substantial factor" in bringing about the injury. The Second Circuit stated that the charge was "incompatible" with the Rogers requirements, and that the District Court had therefore erred, 474 F.2d at 364. Nevertheless, for reasons not applicable to the case at bar, the Court found that plaintiff had not been prejudiced by the erroneous charge, and it did not disturb the jury verdict in favor of the defendant.

The Second Circuit apparently put at least some reliance on two of defendant's arguments. First, the defendant argued that the District Court had overcome the prejudicial effect of the "substantial factor" charge by repeatedly explaining plaintiff's burden of proof in language

that arguably could be construed to comply with the Rogers requirements. The District Court had five times said, in effect, that defendant would be liable if its negligence or the unseaworthiness of the vessel was a proximate cause, in whole or in part, of plaintiff's fall. The "in whole or in part" language also appeared in two interrogatories submitted to the jury. The Second Circuit apparently did not rely chiefly on this first argument, finding only that it had "some force" and that the instructions had been "at best confusing" 474 F. 2d at 364. Even if the Court had found defendant's first argument persuasive, the case at bar is readily distinguishable. In the within case, the court gave an erroneous common law proximate cause charge, without making any effort to convey to the jury the true nature of the Rogers test. That Mr. Lugo was severely prejudiced by both the erroneous jury charge, and the court's refusal of plaintiff's request for a Rogers charge, is readily apparent. The jury found the defendant negligent and/or the vessel unseaworthy. But, because the jury had only an erroneous standard by which to determine proximate cause, a verdict was rendered in favor of the defendant

in which causation was found to be lacking. Thus, to the extent that the Court in Farnarjian relied on defendant's first argument, the case is clearly distinguishable.

The Second Circuit in Farnarjian found defendant's second argument to be 'quite persuasive'. 474 F. 2d at 364. Defendant argued that the plaintiff therein could not have been prejudiced by an error in the proximate cause charge because causation was not an issue in the case. There was no question that plaintiff's fall had been caused by the soapy water on the deck. The only questions were whether the presence of the soapy water was due to the negligence of the chief steward, and whether it rendered the ship unseaworthy. Therefore, the Court did not believe that any "substantial rights" of the plaintiff had been prejudiced.

The Court's refusal to reverse based upon defendant's second argument makes that case completely distinguishable. In the within case, the jury found the defendant negligent and/or the vessel unseaworthy, but failed to find that such fault had "caused" the plaintiff's

accident. Thus, causation was the critical issue upon which the verdict turned, as distinguished from the Farnarjian case, where causation was not even at issue. There can be no doubt that Mr. Lugo was severely prejudiced by the Court's erroneous proximate cause charge. The jury was instructed to determine the issue of causation pursuant to a traditional common law proximate cause charge, a standard that is much more stringent than the Rogers test, and completely inappropriate in a Jones Act case. As a result, the jury was caused to make an erroneous finding on the issue of causation, to the great prejudice of plaintiff.

The conclusion is inescapable that the erroneous proximate cause charge caused the jury to render a verdict that is inconsistent and contrary to the weight of the evidence and law. However, the mere fact that the jury rendered such a defective verdict requires it to be set aside, regardless of how it arose.

POINT III

THE VERDICT IN FAVOR OF THE DEFENDANT IS INCONSISTENT AND CONTRARY TO THE WEIGHT OF THE EVIDENCE, IN THAT THE JURY FOUND THAT CERTAIN CONDITIONS RENDERED THE VESSEL UNSEAWORTHY AND/OR THE DEFENDANT NEGLIGENT, YET IT FAILED TO FIND, IN COMPLETE CONTRAVENTION OF UNCONTRADICTED AND OVERWHELMING EVIDENCE, THAT SUCH CONDITIONS CAUSED THE PLAINTIFF'S ACCIDENT AND RESULTING INJURIES.

The jury, in responding to the first special verdict question, found the defendant negligent and/or the vessel unseaworthy. One must conclude that the jury found that the hatch was improperly and inadequately ventilated and/or there was inadequate and improper lighting for the work being performed. In response to the second special verdict question, the jury found that such unseaworthiness or negligence was not a proximate cause of the accident and resulting injuries to the plaintiff. This verdict is inconsistent in that the responses to the two special verdict questions cannot be reconciled. The evidence establishing that the improper and inadequate ventilation and lighting caused the accident is so overwhelming that the jury could not reasonably have drawn any other conclusion or inference. Furthermore, there was no evidence before the jury which tended in any way to contradict the plaintiff's overwhelming evidence that the accident

was so caused. Thus, the jury's findings are clearly inconsistent.

When special verdicts cannot be reconciled, the court may not enter a judgment. Royal Netherlands S.S. Co. v. Strachen Shipping Co., 362 F.2d 691 (5th Cir. 1966), cert. denied, 385 U.S. 1004 (1967). While it is true that a court is required to reconcile special verdicts wherever possible, Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, 364 (1962), it is clear that the special verdict rendered herein cannot be reconciled, and must therefore be set aside.

As did the jury on another issue in Reyes v. Grace Line, Inc., 334 F.Supp. 1104 (S.D.N.Y. 1971), the jury in the case at bar, disregarded the complete factual picture presented to it on the issue of causation. In Reyes, a Jones Act case, the court set aside a jury verdict in favor of the defendant and ordered a new trial. The key issue in that case was whether the defendant had warned the plaintiff of a dangerous condition in time for him to have avoided the accident. The jury had found the warning to be adequate. The Court, however, determined that the jury had reached a seriously erroneous result, in complete

disregard of the evidence, which demonstrated overwhelmingly that the warning had not been timely or adequate.

Similarly, the evidence in the within case, demonstrates conclusively that the plaintiff's accident was caused by inadequate and improper ventilation and/or lighting.

The following facts which were established and not disputed during the course of the trial clearly show that the jury could not reasonably draw any conclusions or inferences from the facts before it, except that the negligence or unseaworthiness which they found, was the proximate cause of plaintiff's accident:

1. Plaintiff passed a pre-sign-on physical examination conducted by the shipowner (Tr p 42, lines 6-12)

2. The weather on the day of the accident was hot, when he entered into the hold (Tr p. 48 lines 3-4)

3. The hatch at the time of the accident was hot, humid and dark and the air was stale and stuffy. (Tr p. 50, lines 2-7).

4. The square of the hatch was closed with hatch boards (Tr p. 51, lines 8-11)

5. It was very hot in the hatch when plaintiff entered for the first time (Tr p. 54 line 21-25)

6. There was a petroleum smell or odor present in the deep tanks (Tr p. 62, lines 8-11)

7. Plaintiff during coffee break changed his shirt due to the excessive heat and sweating in the hatch and took table salt (Tr p. 64 lines 4-15, Tr p. 164 line 25; Tr p. 165, line 2-18) during the coffee break.

8. The weather was hot at the time of the second entry into the hatch after coffee break (Tr p. 70, lines 4-5)

9. The ventilation system was not on at anytime while he was working in the hatch (Tr p.70 lines 14-24).

10. The air was hot, humid and stuffy, when he entered the hatch a second time after coffee break. (Tr p. 72 lines 6-8)

11. The inside of the hatch when entered a second time, after coffee break, was much hotter than the outside temperature (Tr p. 73 lines 8-10)

12. The plaintiff had difficulty breathing and the air was bad and the hatch had been closed at least 18 to 24 hours (Tr p. 76, lines 16-25; Tr p. 77, lines 1-17)

13. Plaintiff while working felt dizzy and faint and as he fell into the tank, felt as if his breath left him. (Tr p. 86 lines 14-24).

14. At the time of the accident, plaintiff was feeling weak, dizzy, losing his breath, due to the lack of air. He had difficulty breathing and this caused him to fall into the deep tank (Tr p. 88, lines 2-25, Tr p. 89 lines 1-25)

15. Plaintiff's health was good prior to June 1, 1975 (Tr p. 111, lines 23-25)

16. Plaintiff did not suffer from any blood pressure or heart problems, dizziness or hypertension. (Tr p.112 lines 2-5)

17. When plaintiff lost consciousness, he did not have the ability to look or think, his breath left him and he then fell (Tr p. 171 lines 15-22, Tr p.172 lines 8-24)

18. There was nothing for plaintiff to hold on to where he was working and he was standing on a narrow ledge. (Tr 83 lines 14-17, Tr p 282, lines 10-21)

19. Plaintiff was not walking at the time he had his accident. He was standing still and did not slip or trip. (Tr p. 280 lines 18-23).

20. Plaintiff took table salt while working in the hatch due to excessive sweating from improper ventilation therein. (Tr p. 307 lines 14-15)

21. The day before the hatch was hot and musty (Tr p. 329, lines 3-12)

22. The ventilation in the deep tanks and hatch was off since March of 1972 (Tr p. 334 lines 19-23, Tr p. 335 lines 2-8)

23. At the time of the accident the temperature outside was 90° and it was warmer inside the hatch and there was no way to get any fresh air into the hatch while it was closed without the ventilation system being on. (Tr p. 338, lines 10-20).

24. While working in the closed hatch, one would sweat from the heat (Tr p. 356, lines 6-12)

25. The outside temperature at 8:00 A.M. was 83° and at 12 Noon 90° (Plaintiff's Exhibit 19 and Tr p. 382, lines 2-12)

26. Prior to the accident, the hatch had been closed from May 31, 1972, at 1335 to the time of the accident approximately 10:30 A.M. June 1, 1972, a period of 21 hours (Plaintiff's Exhibit 26 and Tr p. 519, line 24; Tr p. 520, lines 2-4)

The aforesaid evidence is overwhelming, indisputable and conclusive, that Lugo, as a result of the conditions of the air in the hatch and ventilation, was thereby caused to fall into the deep tank and that improper and inadequate lighting was a contributory factor to the fall.

Furthermore, no evidence was introduced during the course of trial, from which the jury could even reasonably infer that the accident could have been caused in any other manner. The defendant during the course of the trial, tried to show through introducing the Seafarers Welfare Plan medical records (Defendant's Exhibit A) that plaintiff had defective vision, was not wearing glasses at the time of the accident, and this caused the accident. The Exhibit clearly shows that plaintiff only was required to wear reading glasses at the time of the accident, and therefore was not required to wear glasses for work. (See Defendant's Exhibit A, examination of June 3, 1971).

Even if he was required to wear glasses for working purposes, as defendant tried to show, the indisputable fact is that this had no bearing whatsoever on the accident or caused it. Plaintiff testified that at the time

of the accident, plaintiff was standing on a narrow ledge (Tr p. 83 lines 14-17) and was not walking, was not moving, did not slip or trip (Tr p. 280, lines 18-23). In the summation to the jury, the defendant conceded this and stated there was no claim of slipping, tripping or walking (Tr 781) and plaintiff was just standing there when he fell (Tr782) Since plaintiff was not moving, his vision had no effect whatsoever on the accident. This argument by the defendant was merely a smoke screen without any factual evidence. Furthermore, in attempting to show bad health on the part of the plaintiff, that he was subject to difficulty in breathing, defendant introduced a record from the S.S. Longview Victory, which only showed that plaintiff had a cold and was caughing, with no difficulty in breathing or shortness of breath (Tr p. 301 lines 14-23, and Defendant's Exhibit B) or any such history.

Therefore, there was no evidence to show any physical difficulty or disability that plaintiff had, which could have contributed to the accident. The only logical conclusion that the jury could have made was that negligent or unseaworthy conditions caused the accident.

A verdict must be set aside (1) whenever the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded persons in the exercise of impartial judgment could not arrive at a verdict against him, or (2) whenever there is a complete absence of probative evidence to support a verdict for the non-movant. See Bernardini v. Rederi A/B Saturnus, 512 F. 2d 660, 662 (2nd Cir. 1975).

Thus, the jury's failure to find causation is completely contary to the weight of the evidence, and that portion of the verdict must be set aside. In addition, the special verdicts are required to be set aside because they are inconsistent. Improper and inadequate ventilation and lighting are the conditions upon which the jury based its findings of negligence and/or unseaworthiness. Thus, it was completely inconsistent and contrary to the weight of the evidence for the jury to find that such conditions did not cause the accident. Such inconsistent verdicts cannot be reconciled and must be set aside. Thus, while Points I, II and III, are interrelated, each one requires the verdict to be set aside independently of the others.

POINT IV

THE COURT ERRED IN REFUSING TO PERMIT PLAINTIFF'S ATTORNEY TO PRESENT A HYPOTHETICAL QUESTION TO HIS MEDICAL EXPERT WITNESS, WHICH WOULD HAVE ESTABLISHED WITH A REASONABLE DEGREE OF MEDICAL CERTAINTY, THAT IMPROPER AND INADEQUATE VENTILATION COULD HAVE CAUSED PLAINTIFF'S ACCIDENT AND RESULTING INJURIES.

During the course of the trial, the Court refused to permit plaintiff's attorney to ask his medical expert, Dr. Leo J. Koven, a hypothetical question concerning the possible cause of plaintiff's accident. The question was designed to elicit his opinion as to whether, with a reasonable degree of medical certainty, the condition of the air and ventilation in the hatch could have caused the accident and resulting injuries to plaintiff. This hypothetical question properly would have contained facts already in evidence, concerning the condition of the air in the hatch just prior to the accident. See Weinstein's Evidence, Commentary on Rules of Evidence for the United States Courts and Magistrates, 703-1. Dr. Koven would have testified that in his expert opinion it could be said with a reasonable degree of medical certainty that the condition of the air in the hatch could have caused the plaintiff to faint and lose consciousness, and tumble into the deep tank.

The Court, in refusing to permit this question, improperly deprived the jury of an opportunity to even consider the opinion of a duly qualified medical expert to guide and assist it in determining whether the inadequate and improper ventilation caused the accident. The rule is well settled that an expert witness may express an opinion on a subject even though that opinion embraces an ultimate issue to be decided by the trier of facts. Northop Architectural Systems v. Lupton Manufacturing Co., 437 F.2d 889 (9th Cir. 1971); Dickerson v. Shepard Warner Elevator Co., 387 F.2d 255 (6th Cir. 1961); Weinstein's Evidence, Commentary on Rules of Evidence for the United States Courts and Magistrates, 704-01. This rule clearly embraces the opinion of an expert witness as to the cause of the accident, and the resulting injuries to the plaintiff. Padgett v. Southern Railway Co., 396 F.2d 303 (6th Cir. 1968); Schenfeld v. Norton Co., 391 F.2d 420 (10th Cir. 1968). Thus, Dr. Koven's expert opinion on the issue of causation was clearly admissible.

This circuit court has held in the case of U.S. v. Ottley, 509 F.2d 667 (2d Cir. 1975) that normally it

would not reverse a verdict on an evidentiary ruling within the discretion of a trial court, but when information sought involved one of the chief or major issues before the jury, exclusion of this testimony, which may have affected the trial's outcome, would be reversible error. This is applicable to this case.

Dr. Koven's testimony was not permitted by the court to be elicited on the question of causal relationship between the conditions which existed in the hold and the accident. (Tr p 227 lines 2-15, Tr 227 lines 24-25 and Tr p 228 lines 2-3). This was the most crucial issue before the court, as the court, itself, stated.

It has been held proper for a doctor to give his professional opinion that certain conditions would cause a person to faint. Pagano v. Magic Chef Inc., 181 F.Supp. 146 (ED Pa. 1960). It is clear that a doctor does not have to be a specialist in a particular field in order to be qualified to express his expert medical opinion on a subject of general medical knowledge, such as conditions under which a person would be likely to faint. Harris v. Smith, 372 F.2d, 806, 813-815 (8th Cir. 1967); Baerman v. Reisinger,

363 F.2d, 309, 310 (D.C. Cir. 1966) and Sher v. DeHaven, 199 F.2d, 777,788 (D.C. Cir. 1952) cert. denied 345 U.S. 936 (1953).

When a doctor is expressing his expert opinion on a general medical matter, the question concerning his qualification, as a specialist, only goes to the weight of his testimony, and not to its admissibility. Cordle v. Allied Chemical Corp., 309 F.2d, 821,826 (6th Cir. 1962).

The jury during its deliberations wanted to know how Mr. Lugo felt from the time he got off of his regular work up until the time of his accident (Court Exhibit 8). On this crucial point, the jury was entitled to have the doctor's opinion, as guidance, even though it was not binding on the jury (see cases just cited). Dr. Koven, although an orthopedic surgeon, was and still is a qualified medical physician with training and knowledge in all phases of medicine and, as indicated herein, was entitled to express his opinion as to conditions in the hatch which would have caused Mr. Lugo to faint. The degree of the doctor's medical qualifications goes to the extent to which the jury would give his testimony, not its admissibility. Hamilton v. O'Neil, 273 F.2d 89 (D.C. Cir. 1960).

The plaintiff was severely prejudiced by the Court's exclusion of testimony by Dr. Koven, and it is therefore respectfully submitted that the Court thereby abused its discretion. The jury ultimately determined that the defendant was negligent or the vessel unseaworthy because of the inadequate and improper ventilation and/or lighting in the number two hatch just prior to the accident. Mr. Lugo's uncontradicted testimony during the course of the trial established that these conditions caused the accident. In not permitting Dr. Koven to express his expert opinion on the issue of causation, the Court deprived the jury of an extremely crucial and essential piece of evidence. Dr. Koven's testimony would have shown that the negligence or unseaworthiness claimed could have caused plaintiff's accident, and in fact, was the only logical cause of the accident. As a result of being deprived of this evidence, the jury came up with a verdict that is inconsistent and contrary to the weight of the evidence. The verdict must therefore be set aside.

CONCLUSION

THE COURT ERRED IN DENYING PLAINTIFF'S REQUEST FOR A ROGERS' NEGLIGENCE AND CAUSATION CHARGE AND IN GIVING A TRADITIONAL PROXIMATE CAUSE CHARGE WITHOUT EXPLANATION, AS A RESULT OF WHICH THE JURY RENDERED A VERDICT WHICH WAS INCONSISTENT AND CONTRARY TO THE EVIDENCE AND LAW. THE COURT FURTHER ERRED IN REFUSING TO PERMIT PLAINTIFF'S ATTORNEY TO ASK HIS MEDICAL EXPERT THE HYPOTHETICAL QUESTION ON THE ISSUE OF CAUSATION. THE VERDICT IN THE COURT BELOW SHOULD BE SET ASIDE AND A VERDICT SHOULD BE DIRECTED FOR THE PLAINTIFF OR, IN THE ALTERNATIVE, A NEW TRIAL SHOULD BE GRANTED.

Respectfully submitted,

SCHULMAN, ABARBANEL & SCHLESINGER
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Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Geraldine Salazar, being duly sworn, deposes and says: deponent is not a party to the action is over 18 years of age

On March 15, 1976, deponent served the within Appellant's brief upon Kirlin, Campbell & Keating, attorneys for Defendant-Appellee in this action, at 120 Broadway, New York, New York 10005, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in- a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Geraldine Salazar
Geraldine Salazar

Sworn to before me this
15th day of March, 1976
Arthur Abarbanel

ARTHUR ABARBANEL
Notary Public, State of New York
No. 30-5000775
Qualified in Nassau County
Commission Expires March 30, 1976